Filed 1/26/10 Marriage of Falcone and Fyke CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Marriage of RICHARD FALCONE and KATHEY FYKE.	H033156 (Santa Clara County Super. Ct. No. 103-FL116312)
RICHARD FALCONE, Respondent, v. KATHEY FYKE, Appellant.	

This is the 12th appellate proceeding brought in this dissolution action by Kathey Fyke, respondent below. In the instant appeal, Kathey[1] challenges the trial court's order awarding sanctions of $16,284 under Family Code section 271,[2] to her former husband, Richard Falcone. The sanctions represent fees and costs incurred by Richard in unnecessarily preparing for a trial, which was continued at the last minute due to Kathey's medical condition.

On appeal, Kathey raises the following claims: (1) her due process rights were violated as she was not given the proper notice or opportunity to be heard on Richard's

[1] Following our custom in this and other family law cases, we refer to the parties by their given names for purposes of clarity and not out of disrespect.

[2] Further unspecified statutory references are to the Family Code.

request for section 271 sanctions; (2) the order awarding sanctions is not supported by substantial evidence; (3) the sanctions impose an unreasonable burden on her in violation of section 271, subdivision (a); and (4) the request for sanctions was not supported by a current income and expense declaration as required by the Superior Court of Santa Clara County, Local Family Rules.

We agree that Kathey was afforded neither adequate notice nor a meaningful opportunity to be heard on the request for sanctions and therefore shall reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

At a trial setting conference in January 2008, before Judge Thomas William Cain, the parties were set for a two-week trial commencing May 12, 2008. The parties were given a copy of Judge Cain's "Trial Statement," which was to be filed by noon on the Friday preceding the trial; i.e., May 9, 2008. This "Trial Statement" included an admonition that, absent unusual circumstances, the court was reluctant to continue the trial.

In April 2008, Kathey filed a motion to continue the trial date, which motion was eventually set for hearing on May 6, 2008, before Judge Patricia M. Lucas.[3] The day before the hearing, Kathey telephoned Judge Lucas's clerk and "reported that she had just been released from the hospital, did not feel well, and would not be attending the hearing the following day." She offered to provide documentation from her physician and was directed to fax those documents to both Richard's counsel and the court. Kathey faxed a copy of a note from a "K. Welter MD" on Camino Medical Group letterhead, which read in its entirety: "Kathy [*sic*] Fyke cannot participate in the court dates starting 5/9/08, due

[3] The record does not include a copy of the motion to continue, but as discussed in the parties' briefs, the motion was based on Kathey's claim that she had been hindered in her ability to prepare for trial due to Richard's failure to provide her with a password necessary to access certain essential files on her computer.

to medical illness. Please postpone."[4] On the cover sheet, Kathey wrote that she would also be unable to attend the hearing on May 6, 2008, and advised that if a second note was required to excuse her absence from that hearing, the clerk should call and leave her a message.

Because the physician's note only addressed "court dates starting 5/9/08," Judge Lucas's clerk called Kathey and advised her that the May 6, 2008 hearing would remain on calendar. Kathey faxed a second note, again signed by "K. Welter MD," which stated "Kathy [*sic*] Fyke cannot be present at any court dates between now and June 2, 2008 due to illness." This note appears to have been received by the court after hours on May 5, 2008.

After receiving a copy of the physician's note from Kathey, Richard's counsel faxed Dr. Welter on May 5, 2008, asking that Dr. Welter authenticate the note, but Dr. Welter did not respond to that fax.

Notwithstanding the notes from Kathey's physician, the May 6, 2008 hearing was not continued and Kathey personally appeared. When the parties were asked to state their appearances on the record, the following exchange took place between Kathey and Judge Lucas:

"[KATHEY]: Kathey Fyke. And I'd like to say I'm on a total of five different medications right now. I'm here against doctor's orders. [¶] I'm not sure what has happened. I sent two notices from my doctor about me not participating today. I offered whatever else the Court needed.

"THE COURT: Why don't you have a seat, please.

[4] The note sent to Richard's counsel reads "Kathy [*sic*] Fyke cannot attend court 5/9/08 due to medical reasons." The parties do not acknowledge or explain why the text of this note is different from the text of the note sent to Judge Lucas.

"[KATHEY]: I'm extremely ill, and as a matter of fact I'm taking some nitroglycerin right now. And I would appreciate it if the Court could continue this, because I cannot continue. I'd like to take this pill and then call 911.

"THE COURT: Would you have a seat, please, Ms. Fyke.

"[KATHEY]: In a minute.

"THE COURT: Would you have a seat, please, Ms. Fyke.

"[KATHEY]: Can you give me a minute to take this, please.

"THE COURT: Ms. Fyke, I would like you to have a seat, please. Would you do that?

"[KATHEY]: Can you give me ten seconds?

"THE DEPUTY: Ms. Fyke, would you please have a seat.

"[KATHEY]: Just a minute, Your Honor. I just dropped the pills.

"THE COURT: Ms. Fyke, I would like you to sit down, please.

"[KATHEY]: I will. I will, Your Honor.

"THE DEPUTY: Ma'am, could you please have a seat.

"THE COURT: Ms. Fyke.

"[KATHEY]: I need to take a pill.

"THE COURT: You can sit down.

"[KATHEY]: They're all falling out.

"THE DEPUTY: Please sit down. Sit down and clean it up, please.

"[KATHEY]: Your Honor, I need to go. I need to--I'm--I apologize. I'm not feeling well. I'm in distress right now. I'm supposed to call 911. Could I please--I'm not feeling well. [¶] My doctor gave you her phone number if you wanted to confirm with her. I don't understand why I had to be drugged [*sic*] through this. I had a lot--

"THE COURT: This is a hearing on the Respondent's motion to continue the trial.

"[KATHEY]: And I should have--

"THE COURT: Is that matter submitted?

"MS. YATES-CARTER: Yes, Your Honor.

"[KATHEY]: And I should have an opportunity to, um, to address it and deal with--and I gotta go, Your Honor. I'm sorry.

"THE COURT: Do you--

"[KATHEY]: Can I please be excused?

"THE COURT: Do you want to submit this matter for decision?

"[KATHEY]: No. [¶] I've got other information I wanted to share with you about the status of the computer.

"THE COURT: Could we have the parties sworn, please.

"THE CLERK: Please stand and raise your right hand.

"[KATHEY]: I'm not doing this, Your Honor. I'm sorry. I've asked for whatever is there, um, I apologize, um, I can't. You're welcome to call my doctor, but I, um, I'm having severe chest pains. The nitro's not kicking in and, um, I need to go take care of this. I apologize.

"THE COURT: Okay. Can I--can I get--Ms. Fyke.

"[KATHEY]: Could you--do you have emergency--

"THE DEPUTY: Are you telling me you have chest pains right now, strong chest pains?

"[KATHEY]: The nitro didn't--

"THE DEPUTY: Would you like me to call 911? I don't want you to fall over. Sit down.

"THE COURT: Ms. Fyke, would you cooperate, please cooperate with the Deputy and sit down. [¶] Ms. Fyke, cooperate with the Deputy and sit down.

"THE DEPUTY: Do you want me to call emergency medical assistance, 911? [¶] Ms. Fyke, do you need emergency medical assistance?

"[KATHEY]: I want to call my doctor.

"THE DEPUTY: Do you want me to call 911, yes or no?

"[KATHEY]: I'm sorry. I'm not doing this. I'm sorry."

The transcript then reflects that Kathey left the courtroom.

On May 7, 2008, Judge Lucas issued an order denying Kathey's motion to continue the trial. In her order, Judge Lucas noted that neither of the physician's notes Kathey provided prior to the hearing date included any information "concerning physical or other limitations that would preclude [Kathey]'s participation." She also indicated that, at the hearing, Kathey said she needed to take her pills before she could sit, but failed to explain why she waited until the matter went on the record to take those pills. Judge Lucas's order also noted that Kathey failed to cooperate with the deputy sheriff and did not answer his question about whether she wanted emergency medical assistance. The court concluded that Kathey had failed to show good cause to continue the trial based on either the grounds raised in her initial written motion, i.e., that Richard had deprived her of access to a computer, or with respect to the "alternative basis [Kathey] now apparently asserts, *i.e.*, that she is medically unable to proceed with trial." The order states that Kathey provided no declaration or sworn testimony regarding any supposed medical limitations and the physician's notes that were provided were neither sworn nor authenticated.

The order noted that Kathey's "physical appearance [at the hearing] . . . was no different than at previous court appearances, and her claim of medical incapacity is inconsistent with her own conduct at that hearing. . . . If [Kathey] were experiencing serious medical difficulties, she would have accepted the offer to call 911 and to summon emergency medical assistance, rather than walk briskly out of the courtroom on her own power, repeating 'I'm not doing this.' [¶] What the Court saw and heard is more consistent with a litigant who wants to prevent the proceedings from going forward, which has been [Kathey]'s practice throughout this litigation. [Kathey] has long resisted bringing this matter to trial. The case is now over four and a half years old, the trial court

file is now in eighteen volumes, and [Kathey] has initiated eleven appellate proceedings. Those proceedings have caused delay in the trial court."

On May 7, 2008, after receiving a copy of Judge Lucas's order, Judge Cain's clerk telephoned the parties to remind them that their "Trial Statements" must be filed by noon on May 9, 2008. At that time, Kathey informed the clerk that she would not appear at trial, making "vague references to heart surgery, and having just left the hospital."

Judge Cain's clerk left telephone messages for Kathey's physician, who returned the call on the morning of May 9, 2008.[5] The physician explained that she saw Kathey on May 2, 2008, and that Kathey had an angioplasty the following day, which included placing stents in two coronary vessels. Kathey was initially released from the hospital on May 4, 2008, but returned on May 6, 2008 and was released again on May 7, 2008. Judge Cain asked that the physician put this information in writing and fax it to the court, and directed his clerk to notify Richard's counsel of the need to address a potential continuance request at the outset of trial on May 12, 2008.

On May 12, 2008, the parties stated their appearances and Judge Cain indicated that Kathey, who was appearing by telephone, had requested a continuance. Richard's counsel opposed that request, arguing that Kathey had been consistently trying to continue the trial and expressing doubts about the "validity of this last-moment plea."

Judge Cain granted the request for a continuance, principally due to the new information he had learned from Kathey's physician, and reset the matter for trial on

[5] This is how the events are described in the trial court's May 15, 2008 order. During the May 12, 2008 hearing, however, Judge Cain made no mention of his clerk leaving any messages for Kathey's physician. Instead, he said that, on May 7, 2008, "moments after hanging up [with Kathey], the doctor called us directly" and expressed her confusion as to why the prior two notes were inadequate to postpone the trial. Kathey's physician was informed that the notes lacked sufficient detail about Kathey's medical condition to justify postponing the trial. On May 9, 2008, the doctor again called the court, saying that Kathey had given her permission to disclose her health information to the court.

August 11, 2008. The judge expressed his "concerns about how much of [the inconvenience and expense] could have been avoided had Ms. Fyke simply just provided [Judge Lucas] with some additional information last Monday. . . . Because had Judge Lucas had this information, her outcome might have been different in which case you might have headed off at least some of the expense and people and everything else that you've since had to incur subsequently." He further acknowledged that Richard had been inconvenienced and had incurred undue expense in preparing for trial, and invited Richard's counsel to submit "by declaration or otherwise the expense and cost that you believe you've incurred between . . . Monday and Friday at 9:00."

The trial court then proceeded to discuss calendaring a new trial date, as well as resetting the hearings on two pending motions that Kathey had filed, both of which were set for hearing *after* the originally scheduled trial. Richard's counsel requested that the court continue those motions until after any new trial, and prohibit Kathey from filing any more motions pending trial.

When the court asked for Kathey's response to the requests made by Richard's counsel, the following colloquy took place:

"[KATHEY]: Your Honor, with all due respect, I--I'm trying to do my best here. I'm not supposed to be doing this. And, again, I'm on medications. I do not understand 100 percent of what I'm saying. This also goes to this statement about what you said a little earlier about her putting together what--how much she spent.

"THE COURT: Right.

"[KATHEY]: I would love an opportunity to address that.

"THE COURT: Okay.

"[KATHEY]: But the whole point of it is I'm not in a position to address it today.

"THE COURT: Why not?

"[KATHEY]: So--

"THE COURT: Why not?

"[KATHEY]: Because I feel like crap, Your Honor. And I'm trying to explain to you that with these meds--I threw up. [¶] Number one, [Richard's counsel] isn't telling [the] truth.

"THE COURT: What isn't she telling the truth about?

"[KATHEY]: The one that has to do with an order that was rewritten that needs to be rewritten. It's got nothing to do with--with the trial. The second thing, [Richard] is in contempt of quite a few things. And I have to say this, Your Honor: I--[Richard] is in violation of the standard restraining order, took away my health insurance, so he was a contributor in this mess. Even a month ago, I wrote and said hey, my insurance. I need this paid for. And he wouldn't do it. I'm rambling. I have no idea what I'm saying. And I would be glad to pick this up in a month.

"THE COURT: All right."

Following this exchange, the court proceeded to set a new trial date. There was no further discussion of the issue of sanctions.

On May 14, 2008, Richard's counsel submitted a declaration and itemization of services performed in preparation for trial in support of Richard's request for fees and costs under section 271. According to the itemized statement, Richard's counsel billed a total of $16,284 in the week prior to the originally scheduled trial.

On May 15, 2008, Judge Cain issued a written order imposing $16,284 in fees, costs and sanctions against Kathey under section 271, subdivision (a). In that order, Judge Cain specifically noted that Kathey, despite many opportunities, failed to "provide <u>any</u> details, or chronology of events, as to her medical situation (even when Judge Lucas attempted to elicit such information from her at the time of the May 6, 2008, hearing, as noted at length in her opinion), to either the undersigned, his Clerk, counsel for the Petitioner or Judge Lucas," and expressly found that "[Kathey]'s failure . . . unnecessarily increase[d] the cost of litigation to [Richard]."

On July 14, 2008, Kathey filed separate "objections" to Judge Lucas's May 7, 2008 order denying her request for continuance and Judge Cain's May 15, 2008 order awarding fees, costs and sanctions, along with declarations and supporting exhibits. That same day, she filed a notice of appeal from the May 15, 2008 order.

II. DISCUSSION

Kathey maintains that she was denied due process of law because she was not given notice or an opportunity to be heard on the request for sanctions under section 271. The issue of sanctions was first raised by the court during the May 12, 2008 hearing, when the trial judge invited Richard's counsel to provide him with evidence of the expenses and costs incurred during the week before the trial. We agree.[6]

Section 271, subdivision (a), allows a trial court to base an award of attorney's fees and costs on the extent to which a litigant's conduct "furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation." An award of attorney fees and costs under the statute is "in the nature of a sanction." (*Ibid*.) However, "[a]n award . . . pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard." (§ 271, subd. (b).)

A challenge based on the notice and hearing requirements of section 271 presents a question of law for our independent review. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177.)

A. Notice

When sanctions are sought against a party, whether by another party or on the court's own motion, the notice provided must specify the authority relied upon; e.g., a code section or a court rule. Moreover, the notice must advise of the specific grounds

[6] Because we find the due process issue to be dispositive, we need not reach the other claims raised in Kathey's opening brief.

and conduct on which sanctions are to be based. (*In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417, 1421-1422 (*Quinlan*).)

In *Quinlan*, the trial court issued a written order granting an oral motion for sanctions under Code of Civil Procedure section 128.5. However, that order was reversed because the sanctioned party had no prior notice of the grounds recited in the order. (*Quinlan*, *supra*, 209 Cal.App.3d at p. 1421.) In fact, the court reversed the order *despite* finding that sanctions were "deserve[d]" as the conduct in question "waste[d] precious judicial resources, cause[d] needless expense to the taxpayers as well as the opposing party, and constitute[d] a serious breach of an attorney's professional duty as an officer of the court." (*Id*. at p. 1422.)

In this case, Kathey had no prior notice of either the possibility that sanctions would be imposed, let alone the statutory basis for the trial court's order. According to the record, the trial court advised Richard "of the need to address a potential continuance request at the outset of the trial on May 12, 2008," but the first hint that the trial court was considering awarding attorney fees and costs to Richard is during the May 12, 2008 hearing when Judge Cain stated, "[Richard] is the one that's being inconvenienced [by the last-minute continuance of trial]." The statutory authority for sanctions, section 271, never mentioned, either by the court or by the parties.

Although notice is required, due process does not necessarily require that a motion for sanctions be heard on a separate, later date. "The adequacy of notice, even when a trial court indicates an intent to impose sanctions on its own motion, should not depend upon an arbitrary number of days' notice but 'should be determined on a case-by-case basis to satisfy basic due process requirements. The acts or circumstances giving rise to the imposition of expenses must be considered together with the potential dollar amount.' " (*Quinlan*, *supra*, 209 Cal.App.3d at p. 1422, quoting *Lesser v. Huntington Harbor Corp.* (1985) 173 Cal.App.3d 922, 932.) For example, where the substantive basis for sanctions is narrow, such as a single sanctionable act during the course of a hearing, and

the amount at issue is small, there is usually a minimal need to prepare a substantive defense. Under such circumstances, if the court gives clear warning from the bench of the anticipated grounds for sanctions and counsel is given an adequate opportunity to present an oral response, sanctions may ordinarily be imposed as part of the hearing during which the challenged misconduct occurred; due process does not require a separate hearing. (*Quinlan*, *supra*, at p. 1423.)

In this case, however, it was not Kathey's conduct during the hearing itself that provided the basis for the sanctions, but her conduct the week prior to that hearing. Furthermore, at the time of the hearing, the trial court had no idea of the amounts at issue. Under these circumstances, due process would require a separate hearing.

Finally, the court must give notice that it is considering imposing sanctions before making findings and deciding whether to assess sanctions. (*Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1387.) Here, before even mentioning the fact that it was considering sanctions, the court noted that Richard had been inconvenienced, and proceeded to make the finding that Kathey's failure to timely provide sufficient information about her medical condition "might have headed off at least some of the expense" that Richard incurred in preparing for trial. The court then, again without mentioning the fact that it was considering imposing sanctions, invited Richard's counsel to "present to [the court] by declaration or otherwise the expense and cost that you believe you've incurred between . . . Monday and Friday at 9:00."[7] As a result, the trial court skipped the "notice" step, and proceeded directly to the "findings" and "order" steps, leaving only the amount of sanctions imposed to be determined. This was improper.

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[7] The parties dispute whether the reporter's transcript accurately reflects whether Judge Cain said "9:00" or "noon," with Kathey arguing that the "9:00" which appears in the transcript is correct and Richard claiming that, under the circumstances, "noon" makes more sense. Based on our disposition, we need not resolve the controversy.

B. Opportunity to be heard

Another aspect of procedural due process, besides the requirement of adequate notice, is the right to a *meaningful* opportunity to be heard. (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338-339.) We find that Kathey was denied that right as well.

After inviting Richard's counsel to submit a declaration or other evidence to show how much expense was incurred in preparing for trial, the trial court immediately changed subjects and began to discuss calendaring a new trial date. When the trial court invited Kathey's comments on the new trial date, Kathey returned to the issue of Richard's trial preparation expenses, and told the court that she "would love an opportunity to address that." The court responded, "Okay." Kathey explained she was "not in a position to address it today," because she was not feeling well and was on various medications that made her vomit. She proceeded to make some reference to Richard's counsel being untruthful regarding certain events, and said that Richard was partially responsible for her medical issues and was in contempt of certain court orders, for failing to pay for her medical insurance. Kathey concluded by saying "And I would be glad to pick this up in a month," to which the court responded, "All right."

Even assuming this could be described as an opportunity to respond, it can in no way be characterized as a *meaningful* opportunity to respond. First, it is not even clear that Kathey was aware that this hearing constituted her one and only opportunity to respond to the trial court's sua sponte motion to award sanctions. Kathey twice advised the court that she wanted to address the issue at a later date, and at no time did the court advise her that she would not be allowed to do so.[8] Instead, when Kathey said she would

[8] By granting a continuance of the trial, the court obviously assumed that Kathey was being truthful about her medical condition and was deferring to the assessment of Kathey's physician as to when Kathey could safely participate in a trial. It seems incongruous for the trial court to then apparently expect Kathey, who claimed to have (continued)

be "glad to pick this [i.e., the issue of Richard's unnecessary expenses] up in a month," the trial court seemed to acquiesce by responding "All right."[9]

Richard argues that Kathey waived her right to a hearing by failing to make a specific request for one. (*In re Marriage of Petropoulos*, *supra*, 91 Cal.App.4th at p. 179.) In *In re Marriage of Petropoulos*, this court found that the sanctioned party waived her right to a hearing because: (1) there was no evidence in the record that the sanctioned party requested such a hearing; (2) the sanctioned party apparently acquiesced to the trial court's briefing schedule on the written submission of the fee issue; and (3) the sanctioned party did not move for reconsideration or a new trial of the fee issue. (*Ibid*.)

This case is distinguishable from *In re Marriage of Petropoulos* because, here, there *is* some evidence to show that Kathey requested a subsequent opportunity to be heard on the subject of sanctions.[10] Though Kathey did not directly state, "I would like a separate hearing on this issue," she made it abundantly clear to the trial court that she desired the opportunity to respond at a later date. Since the trial court's response to Kathey's statements was vaguely positive, rather than explicitly negative, she cannot be faulted for not making a more specific demand for a hearing.

Finally, even assuming Kathey had a meaningful opportunity to respond to the question of whether or not sanctions should be imposed on her, there can be no question she had no meaningful opportunity to respond to the amount that was awarded. Even if Kathey had not been laboring under the impression that she could "pick this up in a month," the trial court was obviously not expecting any response or opposition to the

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recently had an angioplasty with the placement of stents in two coronary blood vessels and was on unknown medications, to mount a coherent and thorough response to an issue that was sprung upon her without advance notice.

[9] The court's response could arguably be characterized as noncommittal, but it cannot be reasonably understood to be a rejection of Kathey's request to defer the issue.

[10] A further distinction is that the trial court in this case did not set a briefing schedule for written submissions on the issue of sanctions.

evidence provided by Richard's counsel regarding his trial preparation expenses since the written order awarding the full amount requested was filed just one day after receiving that evidence.[11]

In conclusion, we wish to make clear that our disposition in this case should in no way be read as an endorsement of Kathey's conduct below. Like the sanctioned party in *Quinlan*, Kathey "waste[d] precious judicial resources, cause[d] needless expense to the taxpayers as well as the opposing party . . . . [and] deserve[d] substantial sanctions." (*Quinlan, supra,* 209 Cal.App.3d at p. 1422.) With adequate notice and an opportunity to be heard on the subject, Kathey could still properly have been found to have unnecessarily increased the costs of litigation and been ordered to reimburse Richard for the portion of his fees and expenses that were needlessly incurred. Without such adequate notice and a meaningful opportunity to be heard, however, the sanctions order must be reversed.

[11] We note that, where a court fails to receive opposition to a motion or other request, it will often make special mention of that fact in its subsequent order. The May 15, 2008 order does not contain any such reference, which supports our conclusion that the trial court expected no response from Kathey.

III. DISPOSITION

The May 15, 2008 order awarding sanctions pursuant to Family Code section 271 is reversed.

The parties shall bear their own costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.